TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 477 → 116

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

F. S. ROYSTER GUANO COMPANY

ON WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED MAY 15, 1936.

CERTIORARI GRANTED JUNE 8, 1936.

(31,106)

X hampstead July 1 18.
Sept 1917 by Stubbs

(31,195)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 1230

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

F. S. ROYSTER GUANO COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

INDEX

	Original	Print
Proceedings in supreme court of appeals of Virginia	1	1
Petition for writ of error	1	1
Record from circuit court of city of Norfolk	15	12
Caption	15	12
Declaration	16	12
Conditional judgment	17	13
Order setting aside judgment and granting leave to file special plea	17	13
Special plea	17	14
Order sustaining motion to strike special plea and continuing cause	18	14
Judgment	18	14
Order suspending judgment	18	15
Minute entry of order to file bills of exceptions	19	15
Bill of exceptions No. 1 and order settling same	19	15
Bill of exceptions No. 2	20	16
Argument of counsel	20	16
Plaintiff's interrogatories to defendant	21	17
Testimony of William M. Barrett	24	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 26, 1925

	Original	Print
Articles of incorporation of the American Railway Express Company	29	23
Colloquy between court and counsel	32	26
Exhibit in Evidence—Proceedings in the case of F. S. Royster Guano Co. vs. Southern Express Co. in circuit court of city of Norfolk	33	27
Præcipe for summons	33	27
Summons and sheriff's return	34	27
Declaration	35	28
Motion to quash	36	29
Judgment	36	30
Bill of exceptions No. 3 and order settling same	37	30
Bill of exceptions No. 4 and order settling same	38	30
Bill of exceptions No. 5 and order settling same	38	31
Clerk's certificate	39	31
Argument and submission	40	32
Judgment	41	32
Judge's certificate to clerk	42	33
Clerk's certificate to judge	42	33
Clerk's certificate	43	33
Order granting petition for certiorari	44	34

[fol. 1] IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation,

vs.

F. S. ROYSTER GUANO COMPANY, a Corporation

PETITION FOR WRIT OF ERROR—Filed July 27, 1923

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the American Railway Express Company, would respectfully show unto Your Honors that it is aggrieved by a certain judgment entered in the Circuit Court of the City of Norfolk on the 13th day of April, 1923, in an action at law in which F. S. Royster Guano Company, a corporation (herein called plaintiff), was the plaintiff, and your petitioner (herein called defendant) was defendant, whereby it was adjudged that the said plaintiff recover of and from the said defendant the sum of Four Hundred and Sixty-one Dollars and Forty ($461.40) Cents with legal interest on Four Hundred and Fifty ($450.00) Dollars, part thereof, from the 15th day of May, 1920, until paid and costs. A duly certified copy of the transcript of the record in said cause is exhibited herewith.

The Ground of the Action and Denial Thereof

This action in debt is based on a default judgment obtained by plaintiff against the Southern Express Company on May 15, 1920, for $450.00 with interest and cost.. The plaintiff justifies its claim against the defendant on an alleged merger or consolidation between the American Railway Express Company and the Southern Express [fol. 2] Company and relies on the decision of this Honorable Court in the case of "American Railway Express Company vs. Downing," 132 Va., p. 139. The facts of the cases wholly differ. The cited case was an action brought against the American Railway Express Company based on a claim against the Adams Express Company wherein evidence was introduced indicating a merger or consolidation between the two companies and other facts that satisfied the Court that a legal liability had been created. The instant case differs from the Downing case in that the plaintiff introduced no evidence of such merger or consolidation. Nor did it otherwise show wherein the defendant could be legally held for the obligations of the Southern Express Company. Conversely the defendant on its part, introduced evidence unquestionably showing that there had been no merger or consolidation of the two companies; that there are no contractual relations whatsoever between them whereby the one corporation has any claim against or control over the other; that the Southern Express Company

retains its franchises and corporate existence; that it owns available assets of approximately $1,000,000; that it is now and has been in lawful existence ever since it was forced by order of the Director General of Railroads to cease operations as an express company in the State of Virginia (July 1, 1918), that it is now and always has been subject to the process of the courts of the City of New York, where it continues to maintain its offices and conduct its lawful business.

Brief Statement of Facts

A brief statement of the facts will be helpful in emphasizing the difference between the records of the two cases.

Prior to the time when the United States Government assumed control of the railroads on the 13th day of April, 1918, and until the 1st day of July, 1918, the Southern Express Company operated an express business under contracts with certain railroads through many of the Southern States, including Virginia. There were other express companies operating in the United States under similar conditions. At this juncture the Director General, who had temporary power to enforce his wishes, made known his intention to deal with but one Express Company throughout the United States (M. R., p. 16). This single company, which is the defendant at bar, was thereupon organized under the direction and supervision of the Director General (M. R., p. 17). The Southern Express Company was forced to cease operations and sell a portion of its assets as proposed to it, under a threat by the Director General to so lower its rates as to render opera-[fol. 3] tion unprofitable if it refused (M. R., p. 17). Its tangible property, scattered all over the Southern part of the United States gave it grave concern. The only way it could obtain anywhere near actual value therefor, under the circumstances, was to sell it to the American Railway Express Company at book value, less depreciation. It was also to its advantage to accept shares of stock of the latter company at par for it. The Government's head officials so ordained. The entire transaction was involuntary, as a practical matter and was forced by the direct order of the Director General (M. R., p. 17). These are matters of history as well as of evidence. An allegation of irregularity, or of a jeopardy of the petitioner is an aspersion against the good faith of the Government most tardily to be entertained.

Manifestly there was no voluntary transfer, no merger and no consolidation in fact or in law, expressly or impliedly. The Southern Express Company under the Director General's program, retained its franchises (M. R., p. 18) and still exists and carries on business today. It is well to repeat that at the time of the judgment in question, the Southern Express Company owned real estate and treasury assets of the value of approximately $1,000,000. It still owns them. There has never been a liquidation, and no distribution whatsoever has been made to its stockholders. (M. R., p. 19.) This is what the record in the instant case discloses and obviously upon which this case must be tried. The Downing case, tried under a different set of facts is not controlling.

Moreover, the authorized capital stock of the American Railway Express Company is $40,000,000; the stock issued and outstanding is $34,642,000. The Southern Express Company owns $1,750,000 of the capitalization equivalent to about 5% of the whole. (M. R., p. 20.) The latter company has no control whatsoever over the former and the former, under the Director General's plan, has no contract with the latter and never intended that it should become liable or that it should reimburse the Southern Express Company for judgments recovered against it on claims and liabilities arising out of its operations, past or future (M. R., p. 21.) It paid as a consideration the full market value for what it bought and there ended its obligations; otherwise there is obviously a taking of private property without just compensation and in violation of the Constitution of the United States.

The Southern Express Company has been, ever since it ceased to operate an express business on the 1st day of July, 1918, and still is, in existence with offices at 51 Broadway, New York City (M. R., p. 21) with ample assets to meet all the known outstanding claims [fol. 4] against it, and is subject to any and all suits which may be or might have been brought against it in any proper forum.

Judgment Against Southern Express Company is Void

(a) On the 15th day of September, 1919, which is fourteen and one-half months after the Southern Express Company had withdrawn from the State of Virginia, and was no longer a foreign corporation doing business in this State, the plaintiff filed its action in assumpsit against it in the Circuit Court of the City of Norfolk (M. R., p. 29) and had process served on the Chairman of the State Corporation Commission, as aforesaid. Judgment was rendered by default on this process in favor of the plaintiff on May 15, 1920.

(b) After this default judgment had lain dormant for more than two years, without execution issuing thereon, as required by Sec. 6477 of the Code, or revival thereof by scire facias, the plaintiff on the first Monday in July, 1922, filed its declaration in debt against your petitioner, the American Railway Express Company, alleging liability against it because of the aforesaid judgment had against the Southern Express Company and for that only, as there were no contractual relations between plaintiff and defendant, alleged or proved. It has been made to appear that plaintiff failed to prove, as a fact, in this record any grounds by which this judgment could be construed as a liability against the American Railway Express Company.

The Pleadings

Defendant, therefore, filed its special plea invoking the statutory limitation against the judgment (M. R., p. 3), but the Court rejected it, to which due exception was taken and preserved (M. R., p. 4), (Cert. of Excpt. No. 1, M. R., p. 7). Upon the trial of the issue joined the Court, without a jury, entered judgment against your peti-

tioner in the sum of $461.00 and costs, with interest on $450.00 part thereof, from the 15th day of May, 1920, until paid, and all costs by it expended (M. R., pp. 4 & 5).

Motion for Rehearing Refused and Exception Noted

The defendant, your petitioner, moved the Court for a rehearing [fol. 5] on the grounds (a) "That the judgment was contrary to the law and the evidence;" and was (b) "In violation of the Federal Constitution." The Court overruled this motion, to which action exception was duly taken and preserved (Cert. of Excep. No. 5, M. R., p. 38). It will be helpful to repeat at this juncture that the plaintiff based its claim against the defendant, your petitioner, solely on the judgment it had recovered against the Southern Express Company because of an alleged consolidation of the American Railway Express Company and the Southern Express Company, heretofore explained (M. R., p. 1). Plaintiff omitted, however, as it was in duty bound to prove such or any consolidation in this record while the evidence introduced by the defendant showed beyond question that there was no consolidation or merger whatever but that it had been organized by direction of the Federal Government and required to purchase a portion of the assets of the Southern Express Company. Your petitioner, the defendant below, with these objections as a basis of its motion unsuccessfully moved the Circuit Court to exclude the record on which plaintiff had obtained the judgment against the Southern Express Company and, also, because to hold your petitioner, the American Railway Express Company, liable for and require it to pay the debts of the Southern Express Company, under this state of the record, would be in violation of the Fourteenth Amendment of the Federal Constitution. Moreover, if it were responsible for the Southern Express Company's debts, it had been deprived of due process of law because the Southern Express Company had never had its day in court, for lack of legal process.

Summary of Petitioner's Contentions

(1) The American Railway Express Company by this record, was not made liable for the debts or obligations of the Southern Express Company because of the former's purchase of a portion of the latter's assets.

(2) The American Railway Express Company, under the plan of the Director General of Railroads, forced upon the two interstate transportation corporations, was not made liable for the debts and liabilities of the Southern Express Company.

(3) Such a course would have been contrary to the Constitution of the United States as a taking of private property without just compensation.

[fol. 6] (4) The judgment in question had against the Southern Express Company is void and of no effect because process was not

served on defendant, or lawful substituted process availed of and is contrary to the Federal Constitution because lacking in due process of law.

(5) The judgment, had it been regularly and legally obtained, was no longer available because no execution had issued upon it within a year and in fact within more than two years.

Assignment of Errors

The Circuit Court erred in:

(1) Holding that the American Railway Express Company, upon the facts of this record, became liable for the debts and obligations of the Southern Express Company because of the purchase of and payment in good faith for certain of the latter's assets.

(2) Holding that under the plan of the Director General of Railroads your petitioner became liable or was expected or required under any circumstances to become liable for the debts and obligations of the Southern Express Company, because such conduct would be in violation of the Constitution of the United States.

(3) Rejecting the special plea setting up the statutory limitation against the judgment had by plaintiff below against the Southern Express Company and preserved in Exception No. 1 (M. R., pp. 4 and 7).

(4) Admitting in evidence at the trial the record in the case of "F. S. Royster Guano Company v. Southern Express Company," over your petitioner's objection "of lack of proper process" as shown by the record (M. R., p. 9), and as depriving it of due process of law under the Federal Constitution.

(5) Refusing to set aside the judgment because contrary to the law and the evidence and enter judgment for the defendant.

(6) Overruling the defendant's motion to reject the evidence in- [fol. 7] troduced by the plaintiff and enter judgment for the defendant, on the grounds that the plaintiff had omitted to prove a merger or consolidation of the American Railway Express Company with the Southern Express Company wherefore the evidence introduced was wholly irrelevant and immaterial. Moreover a judgment against the American Railway Express Company, under the record would be in violation of the Fourteenth Amendment to the Federal Constitution. (Cer. of Ex. No. 4, M. R., p. 37.)

Argument

The Faulty Process (Error No. 4)

(1) Process in the case of F. S. Royster Guano Company vs. Southern Express Company was obtained on the Chairman of the State Corporation Commission two years or more after the South-

ern Express Company had withdrawn from the State of Virginia and was no longer "A foreign corporation doing business in the State of Virginia," as provided by statute upon which statutory substituted process could be had. C. V. 1904, Sec. 3225. It is manifest that the Southern Express Company was deprived of due process of law in the judgment entered. For convenience the officer's return is reproduced as follows:

"John B. Hockaday, the lawfully appointed Agent upon whom may be served all lawful process against the within mentioned Southern Express Company, Incorporated, a foreign corporation, being no longer a resident of the State of Virginia, and being absent from the State and no person residing in this State having been appointed in his place the within summons was executed on this 16th day of September, 1919, by delivering a true copy of the same to William F. Rhea, the Chairman of the State Corporation Commission, in person, in the City of Richmond, Virginia, in which city the said William F. Rhea resides, and by immediately transmitting a copy hereof by mail to said Southern Express Company, Incorporated.

"(Signed) J. Herbert Mercer, Sheriff of the City of Richmond, by B. A. Braner, Deputy Sheriff."

[fol. 8] Rejection of Special Plea (Error No. 3)

(2) In rejecting defendant's special plea of limitation to the judgment which is the basis of the plaintiff's action (Cert. of Ex. No. 1, M. R., p. 7). Sec. 6477 Code of 1919 reads in part:

"On a judgment, execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment. * * *"

Execution was not issued "within a year" and the judgment has never been revived by "scire facias" or "action" as intended by the statute. Manifestly the results to be obtained by "scire facias" or by "action" were intended to be the same, viz: to revive and not to enforce the judgment. In White vs. Palmer, 110 Va. 490, this Court held that the proceedings by scire facias is not a new suit but a continuation of the old suit; that it is essential that the writ shall state all of the facts necessary to authorize the relief sought and that it should follow the judgment to be revived as to the amount, date and parties.

In the same case this Court held that the extent of the jurisdiction of the Court upon a proper writ of scire facias to revive a judgment, is to render a judgment to the effect that the plaintiff in the writ may have execution issue on the judgment set forth in the writ. It further held that if the judgment goes further and awards the payment of money, the latter is void for want of jurisdiction and may be assailed collaterally.

It is manifestly that the Circuit Court's error lies in construing the word "action" in the statute to apply to any action which might be brought on the judgment, either to enforce payment or to revive it for execution, either against the same or third persons not parties to the original action. In view of the intent disclosed from a reading of the statute and the construction placed thereon by this Court in White vs. Palmer, supra, it is respectfully suggested that the trial court's construction and ruling was erroneous.

Improper Evidence (Error No. 4)

(3) In admitting in evidence the record in the case of F. S. Royster Guano Company vs. Southern Express Company, over objection of the defendant on the grounds that the judgment as shown [fol. 9] by the record was not valid for lack of proper process on the Southern Express Company. (Cer. of Ex. No. 3, M. R., p. 36.)

The process obtained against the Southern Express Company was served on the Chairman of the State Corporation Commission of Virginia on the 15th day of September, 1919. This was prior to the adoption of the 1919 Code, and fourteen and one-half months after the Southern Express Company withdrew from the State of Virginia and ceased to operate over any of the railroads, steamship or steamboat lines or to do any other business in the State, as provided by statute.

Subsections 2 and 3 of Sec. 1294g of the Code of 1904 as amended which provide for process on such corporations, etc., are as follows:

"To Appoint Person upon Whom Process May be Served.

"(2) Every such corporation, company, association, person or partnership shall, by a written power of attorney, appoint some person residing in this State its agent, upon whom may be served all lawful process against such corporation, company, association, person or partnership, and who shall be authorized to enter an appearance in its or his behalf. A copy of such power of authority, duly certified and authenticated, shall be filed with the State Corporation Commission, and copies thereof, duly certified by the clerk of the said commission, shall be received as evidence in all courts of this State.

"When Another Agent to be Appointed; Upon Whom Process to be served.

"(3) If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of such corporation, company, association, person, or partnership, to appoint another agent in his place, as prescribed by the preceding section. And until such appointment is made, or during the absence of such agent of any such corporation, company, association, person or partnership, from the State, or if no such agent be appointed as prescribed by the preceding action, service of process may be upon the chairman of the State Corporation Commission, with like effect as

[fol. 10] upon the agent appointed by the company. The officer serving such process upon the chairman of the State Corporation Commission shall immediately transmit a copy thereof, by mail, to such corporation, company, association, person, or partnership, and state such fact in his return."

These statutes manifestly apply to those corporations actually operating an express business in the State and not to those which may have at some time operated and have long since withdrawn. It is respectfully contended that there is no law past or present and none has been cited, which forbids a foreign corporation from withdrawing from the State of Virginia at will, and none which requires the maintaining of officers or agents after such withdrawal. Without such a law, statutory or otherwise, it is obvious that process obtained in a manner provided for non-residents that are now operating in the State of Virginia would not be valid process on such residents no longer doing business in the State. It is not necessary for our purpose to contend that the Legislature is incapable of making such provision. Manifestly, if the time for such process could be extended fourteen and one-half months by implication under the existing statutes just cited, it could be extended indefinitely. No comment on this is necessary as to federal interstate policy or comity.

Refusal to Reject All Evidence (Error No. 6)

(4) In overruling the defendant's motion to reject the evidence introduced by the plaintiff and enter judgment for the defendant, on the grounds that the plaintiff had failed to prove a merger or consolidation of the Southern Express Company, and that to hold the company liable for the debts of the former would be in violation of the Fourteenth Amendment to the Federal Constitution. (Cert. of Ex. No. 4, M. R., p. 37.)

There was no privity between the Royster Guano Company, the plaintiff in the instant case and the American Railway Express Company, the defendant therein. Plaintiff's relations were solely with the Southern Express Company. If, therefore, the American Railway Express Company became obligated to the plaintiff it must arise out of its conduct implying a contract in law. Obviously such conduct must be established by satisfying evidence. Plaintiff alleged a merger or consolidation between the two corporations as the conduct creating a privity between it and the American Railway [fol. 11] Express Company. If it failed to prove such merger its case fell. The record of judgment was immaterial and irrelevant and therefore highly prejudicial. We have shown that plaintiff failed to introduce the necessary proof of a merger, which being a condition precedent to the introduction of other evidence, none other was admissible and that introduced possessed no probative value. Conversely the defendant introduced conclusive evidence that there not only had never been a merger or consolidation of the two interstate transportation companies in question; that there are no relations con-

tractual or otherwise between them; that but a small portion of the assets were bought; that no distribution to the shareholders had been made; that the corporation continued in business with plenty of assets to meet all its obligations and that the purchase of the assets was an involuntary one at the order of the Government. The Southern Express Company owns a comparatively small percentage of the capital stock of the American Railway Express Company. The Southern Express Company is a separate and independent entity. It maintains its franchises and corporate existence and owns assets of approximately $1,000,000. It operates at 51 Broadway, New York City, and is responsible for its contracts and torts (M. R., p. 22). It is obvious that these facts do not constitute a merger or consolidation or in any way impose any legal or moral obligation on the defendant, your petitioner, to pay the debts of the Southern Express Company.

American Railway Express Company vs. Downing Distinguished

The plaintiff relies upon American Railway Express Company vs. Downing (132 Va. 139). The record in the principal case is wholly different. The cited case is not authority, as will appear from a brief examination. The liability of the American Railway Express Company for the obligation of the Adams Express Company rests on a proven consolidation between the two companies (p. 145) which is wholly absent in the instant case.

For whatever the proof consolidation or merger in the Downing case, there is no such proof in the case at bar and that is the factor upon which this point will turn. The plaintiff introduced interrogatories (M. R., p. 10, et seq.) to show that the defendant company had issued to the Southern Express Co. certain of its capital stock in payment for certain tangible assets that it had been required by the Government to buy in order to save them from waste or [fol. 12] sacrifice. Outside of this, there is an entire absence of proof of any contractural relations, express or implied and no legal, equitable or moral grounds upon which to place liability on the defendant for the obligation in question. The stock is still a treasury asset, along with about $1,000,000 additional.

The supporting cases cited by the Court in the opinion evidence this contention. They deal with a new company under a consolidation or merger wherein the old are extinguished and their assets absorbed. None deny the right of a corporation to purchase and pay for a portion of the assets of another with its shares of stock Such law would prove a serious handicap in the ordinary course of business. After all, liability would be but a matter of degree—the amount of the purchase. Clearly in the light of those authorities and the conclusions reached by the Court, a mere transfer of a part of the assets by one corporation to another, the former retaining its franchises, corporate existence, with ample assets to pay all its known outstanding indebtedness, and still doing business in a sister State subject to the laws of that State, there is no merger or con-

solidation with the purchasing corporation and no liability on the latter for the debts of the former.

This contention is satisfactorily supported by the opinion in the Downing case. On page 146, Judge Sims quotes from 6 Am. & Eng. Enc. Law (2nd Ed.), p. 818, Sec. 4, as follows:

"When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations *go out of existence, if no arrangements are made respecting their property and liabilities*, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporations whose liability is sought to be enforced against the consolidated corporation." (Italics inserted.)

The Defendant's Evidence in Support

William M. Barrett, for the defendant, testified as follows (M. R., p. 21):

26 Q. Does the Southern Express Company still retain its corporate existence?

A. Yes.

27 Q. Does it maintain offices anywhere?

A. Yes.

28 Q. Where?

[fol. 13] A. New York only.

30 Q. Does it have officers at these offices who are authorized to accept service of suits against it?

A. Yes.

The uncontradicted evidence on behalf of the defendant shows that the Southern Express Co. did not transfer anything like all of its property to the American Railway Express Co. and that claims of its creditors have not in any sense been defeated thereby. Mr. Barrett testified (M. R., p. 18):

10 Q. Did the Southern Express Company retain any property at the time it transferred its tangible property to the American Railway Express Company?

A. Yes.

11 Q. Approximately what amount?

A. We retained such real estate as was not used in the express operation business, together with treasury assets, the value of which was approximately $1,000,000.

There has been no distribution of assets among the stockholders of the Southern Express Company, but they are held to meet its obligations.

Mr. Barrett testified (M. R., pp. 18 and 19):

12 Q. Has the Southern Express Company liquidated itself by distributing any of its property or the stock of the American Railway Express Company to its stockholders?

A. No.

13 Q. There has been no distribution to the stockholders whatsoever?

A. No.

14 Q. Then the stock of the American Railway Express Company which was received in exchange for the tangible property of the Southern Express Company used in the domestic express business is still in the possession of the Southern Express Company?

A. Yes.

And, furthermore, the creditors of the Southern Express Company have never at any time been required to look alone to the stock received by the Southern Express Company from the American Railway Express Company in payment of assets transferred by it. More- [fol. 14] over, the record fails to show that there were any outstanding obligations against the Southern Express Company other than that of the plaintiff. That the Southern Express Company retained real and treasury assets of a value of approximately $1,000,000, which was but a fraction of the assets of the corporation Mr. Barrett testified as follows (M. R., p. 22):

31 Q. Does it have ample assets to meet all the known outstanding claims against it?

A. Yes.

On page 21 of the record, Mr. Barrett testified (M. R., p. 21):

24 Q. Has the Southern Express Company any contract with the American Railway Express Company by which the Southern Express Company agrees to reimburse the American Railway Express Company for judgments recovered against the American Railway Express Company on claims and liabilities of the Southern Express Company?

A. No, and there never was.

25 Q. If a judgment is recovered against the American Railway Express Co. in this suit, what proportion of it will affect the dividends of the Southern Express Co.?

A. Approximately about 5%.

This is the evidence introduced by the defendant, your petitioner, not in rebuttal, for there was no evidence to rebut, but in order that the record might evidence the facts. Manifestly, under such a record there is no merger or consolidation and the defendant company is not liable under an implied obligation to pay the debts of the Southern Express Company. Such a judgment, it is respectfully suggested, would be the taking of its property to discharge the obligations of another and therefore in violation of the Fourteenth Amendment of the Federal Constitution. In the absence of proof of a merger or consolidation of the two companies, there are no contractual or other grounds upon which the one could be held for the obligations of the other. If the record does not establish this potent fact

the case falls without reference to the other errors set forth for which contention is made.

Wherefore, your petitioner prays that a writ of error and supersedeas to the judgment complained of may be awarded it and that for the errors assigned and said judgment be set aside and an- [fol. 15] nulled; and that judgment be entered for your petitioner, or, if this prayer be not granted, that the judgment herein complained of be set aside and annulled and your petitioner be granted a new trial.

American Railway Express Company, by Alfred Anderson, Thomas W. Shelton, Counsel.

I, Thomas W. Shelton, of the City of Norfolk, Virginia, an attorney at law, practicing in the Supreme Court of Appeals, do certify that in my opinion the decision of the Circuit Court of the City of Norfolk, in the common law action of F. S. Royster Guano Company vs. American Railway Express Company should be reviewed by the Supreme Court of Appeals of Virginia.

Thomas W. Shelton.

Given under my hand this 24th day of July, 1923. F. W. Sims.

Write of error and supersedeas awarded. Bond $700.00.

F. W. Sims.

To the Clerk at Richmond.
Received July 28, 1923.

VIRGINIA:

IN CIRCUIT COURT OF CITY OF NORFOLK

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant

[fol. 16] [Caption omitted]

DECLARATION—Filed July, 1922

Be it remembered, that heretofore, to-wit, in the Clerk's Office of the Circuit Court of the City of Norfolk, at Rules held for said Court on the first Monday in July, 1922, came the plaintiff, F. S. Royster Guano Company, and filed its declaration in debt against the defendant, Amreican Railway Express Company, in the following words:

Debt for $450.00, with legal interest from May 15th, 1920. Damages $100.00.

F. S. Royster Guano Company, a corporation under the laws of the State of Virginia, complains of American Railway Express Com-

pany, a corporation under the laws of the State of Delaware, for this, that heretofore, to-wit, on the 15th day of May, 1920, the plaintiff by the consideration and judgment of the Circuit Court for the City of Norfolk, Virginia, recovered against the Southern Express Company, Incorporated, a foreign corporation, the sum of $450.00 damages, with lawful interest thereon from said 15th day of May, 1920, and $11.40 costs of suit as by the record thereof in the same court remaining appears; which said judgment still remains in full force and effect, and the several sums aforesaid are still due and unpaid.

And before said judgment and on or about July 1st, 1918, the defendant took over from said Southern Express Company, Incorporated, all of the property theretofore belonging to it then owned and used by said Southern Express Company, Incorporated, in its express business throughout the United States, including all of such property in Virginia, issuing therefor to said Southern Express Company, Incorporated, or to its stockholders, the stock of said American Railway Express Company, the defendant in this action, by means whereof the assets of said Southern Express Company, Incorporated, have been distributed among its stockholders to the exclusion and prejudice of its creditors.

Whereof an action hath accrued to said plaintiff to have and recover of said defendant the sum of $450.00, with interest and $11.40 [fol. 17] costs, as aforesaid, yet said defendant, though requested, hath never paid said sum, but wholly refuses so to do to the damage of said plaintiff of one hundred dollars.

Cadwallader J. Collins, p. q.

In Circuit Court of City of Norfolk

Conditional Judgment

Whereupon, the defendant having been summoned, and failing to appear, and plead, answer or demur, a conditional judgment was entered against it.

And at another day, to-wit: In the Clerk's Office of the said Court, at Rules held for said Court on the third Monday in July, 1922, the defendant still failing to appear, the judgment entered at the last rules was confirmed, and an office judgment was awarded the plaintiff.

In Circuit Court of City of Norfolk

Order Setting Aside Judgment and Granting Leave to File Special Plea—Oct. 9, 1922

This day came as well the plaintiff by its attorney, as the defendant by Shelton & Anderson, its attorneys, and thereupon, on motion of the defendant, which pleaded nil debit, to which the plaintiff replied generally, it is ordered that the judgment entered at the rules be set

aside, and issue is joined. Thereupon, on motion of the defendant, leave is given it to file a special plea herein, and the same is accordingly filed; and the further hearing is continued.

IN CIRCUIT COURT OF CITY OF NORFOLK

SPECIAL PLEA—Filed Oct. 9, 1922

The said defendant by its attorneys comes and says that the supposed cause of action in the declaration in this action mentioned is founded upon a judgment, dated the 15th day of May, 1920, upon which execution was not issued within the period of limitation allowed by the laws of the State of Virginia and is no longer in force and effect for enforcement against said defendant, were it liable in the manner and form as said plaintiff hath complained against it. And this the said defendant is ready to verify.

Thomas W. Shelton and Alfred Anderson, p. d.

The said defendant, by its attorneys, comes and says that he does [fol. 18] not owe the sum of Four Hundred and Fifty ($450.00) Dollars with interest and Eleven Dollars and Forty ($11.40) Cents cost in the declaration in this action demanded in manner and form as the plaintiff hath complained against him. And of this the said defendant puts himself upon the country.

Thomas W. Shelton and Alfred Anderson, p. d.

IN CIRCUIT COURT OF CITY OF NORFOLK

ORDER SUSTAINING MOTION TO STRIKE SPECIAL PLEA AND CONTINUING CAUSE

This day came again the parties by their attorneys and thereupon the plaintiff moved the Court to strike out the special plea heretofore filed herein by the defendant, which motion being argued, is sustained, to which ruling the defendant excepted; and the further hearing is continued.

IN CIRCUIT COURT OF CITY OF NORFOLK

JUDGMENT—April 13, 1923

This day came again the parties by their attorneys and thereupon, neither party demanding a jury, the Court proceeded to hear the evidence and try the case. Whereupon it is considered by the Court that the plaintiff recover against the defendant the sum of Four Hundred and Sixty-one Dollars and Forty Cents ($461.40), with legal

interest on $450 part thereof, from the 15th day of May, 1920, till paid, and its costs by it about its suit in this behalf expended. Thereupon the defendant moved the Court to set aside the said judgment, and grant a rehearing, which motion being argued, is overruled, to which ruling the defendant excepted.

IN CIRCUIT COURT OF CITY OF NORFOLK

ORDER SUSPENDING JUDGMENT

Be it remembered that on the trial of this case the defendant excepted to sundry rulings of the Court on the trial, and to the action of the Court in refusing to set aside the judgment entered by the Court, and to the judgment rendered by the Court, and leave is given the defendant to file its certificate of exceptions herein within the time prescribed by law.

MEMO.—At the instance of the defendant, which desires to present a petition to the Supreme Court of Appeals of Virginia, it is ordered [fol. 19] that execution upon said judgment be suspended for a period of sixty days from the end of this term upon the defendant, or someone for it, entering into and acknowledging a bond before the Clerk of this Court in the penalty of $500, conditioned according to law, with surety deemed sufficient by said Clerk.

IN CIRCUIT COURT OF CITY OF NORFOLK

MINUTE ENTRY OF ORDER TO FILE BILL OF EXCEPTIONS—May 23, 1923

This day came again the parties by their attorneys, and thereupon the defendant tendered to the Court its Bills of Exceptions Numbers One and Two, which were received by the Court, signed and sealed, and ordered to be made a part of the record, the same having been tendered within the time prescribed by law.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 1 AND ORDER SETTLING SAME

The said defendant, by its attorneys, comes and says that the supposed cause of action in the declaration in this action mentioned is founded upon a judgment, dated the 15th day of May, 1920, upon which execution was not issued within the period of limitation al-

lowed by the laws of the State of Virginia and is no longer in force and effect for enforcement against said defendant, were it liable in the manner and form as said plaintiff hath complained against it. And this the said defendant is ready to verify.

The foregoing plea was filed by the defendant, which plea the plaintiff moved the Court to reject, which motion was sustained and to which ruling of the Court the defendant excepted

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

[fol. 20] IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 2

The following evidence on behalf of the plaintiff and of the defendant, including interrogatories on behalf of the plaintiff and depositions on behalf of the defendant, respectively, as hereinafter denoted, is all of the evidence that was introduced on the trial of this cause.

ARGUMENT OF COUNSEL

Mr. Collins: If your Honor please, we introduce in evidence the entire record of the case of F. S. Royster Guano Company vs. Southern Express Company, including the judgment, final judgment, of course, rendered in the sum of $450.00 on the 15th day of May, 1920, including costs. We introduce this record in the case, of course, and ask that the clerk make out a memorandum of it, including all the papers, and the judgement rendered on that date.

Mr. Anderson: I desire to interpose an objection to the record and particularly to the judgement on the grounds that the judgement is not a valid judgement, process not having been properly obtained, and I desire to make specific reference to the officer's return, which shows that J. B. Hockaday was the only constituted agent of the Southern Express Company upon whom process was to be served, and that there was never an appointment under the statute of the Secretary of the Commonwealth as such agent, and furthermore that at the time of the service the Southern Express Company was not a foreign corporation doing business in the State of Virginia, and even though there had been such an appointment process on the Secretary of the Commonwealth would not have been valid after the withdrawal of the corporation from the State.

The Court: Do you desire to argue that?

Mr. Anderson: I think I can save time by taking up the argument afterward.

The Court: I overrule your objection temporarily, and you can note an exception.

(Exception noted.)

Mr. Collins: If your Honor please, I will now introduce the inter- [fol. 21] rogatories taken for the plaintiff in this case, and will read them to your Honor.

Mr. Anderson: I will read the interrogatories and let you read the answers, if you want to.

NOTE.—Interrogatories and answers on behalf of plaintiff were read as follows:

"IN THE CIRCUIT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant

PLAINTIFF'S INTERROGATORIES

Interrogatories filed with the clerk of the above-named court by the plaintiff, F. S. Royster Guano Company, and to be answered by the defendant, American Railway Express Company, a non-resident corporation.

First. In the month of June, 1918, did you enter into an agreement with the Southern Express Company, and others, by the terms of which you were to carry on, throughout the United States, the express transportation business theretofore transacted by said Southern Express Company and others?

Answer to interrogatory first. No.

Second. Did you at any time enter into any such agreement?

Answer to interrogatory second. No. The American Railway Express Company did not at any time enter into any agreement with the Southern Express Company and others by the terms of which it was to carry on the express transportation business theretofore transacted by the Southern Express Company.

Third. If you have ever entered into any such agreement please file a copy thereof with your answer.

Answer to interrogatory third. See answers to first and Second Interrogatories.

Fourth. On or about the 1st day of July, 1918, did you take over the business of the Southern Express Company and all of its tangible property theretofore owned by it and used in its business paying therefore in whole or in part in the capital stock of the American Railway Express Company?

[fol. 22] Answer to interrogatory fourth. No. This defendant did not take over the business of the Southern Express Company on the first of July, 1918, or at any other time; the American Railway Express Company purchased on June 30th, 1918, the tangible property used in the express business theretofore owned by the Southern Express Company, and paid for same with shares of its capital stock.

Fifth. What was the valuation placed upon said property?

Answer to interrogatory fifth. The valuation placed on property purchased from the Southern Express Company cannot be given as the Southern Express Company was owned by the Adams Express Company, and the value of their tangible property was included in the value of the property purchased from the Adams-Southern Companies.

Sixth. Was the value placed upon said property paid for with capital stock of the American Railway Express Company in whole or in part?

Answer to interrogatory sixth. All of the property purchased from the Adams-Southern Companies was paid for with capital stock of the American Railway Express Company.

Seventh. What amount of stock of the American Railway Express Company was given for said property to the Southern Express Company?

Answer to interrogatory seventh. 10,000 shares of stock of the American Railway Express Company were issued in the name of the Southern Express Company, at the request and direction of the Adams and Southern Express Companies.

Eighth. Did you take over from the Southern Express Company all of its tangible property in Virginia, paying therefor in the capital stock of the American Railway Express Company?

Answer to interrogatory eighth. The American Railway Express Company purchased all of the tangible property owned by the Southern Express Company in Virginia and used in the express business, and all such property was paid for in capital stock of the American Railway Express Company.

Ninth. What valuation was placed upon the property of the Southern Express Company in Virginia taken over by you and paid for in the capital stock of the American Railway Express Company?

Answer to interrogatory ninth. I do not know.

Tenth. What was the par value of the shares of stock of the Ameri-[fol. 23] can Railway Express Company in the month of June and July, 1918, and how many of these shares were delivered to the Southern Express Company for the property owned and used by it in its express business in Virginia?

Answer to interrogatory tenth. $100.00 each was, and is, the par value of shares of stock of the American Railway Express Company. I do not know.

And further this deponent saith not.

(Signed) W. A. Benson.

NOTE.—The foregoing interrogatories are filed in accordance with Section 6236 of the Code of Virginia.

Mr. Collins: Now, if your Honor pleases, we have introduced the interrogatories and record in this case, and rest our case on the interrogatories and the record.

Mr. Anderson: I will read the deposition, if your Honor pleases, of William M. Barrett, taken on behalf of the defendant.

"VIRGINIA:

In the Circuit Court of the City of Norfolk

In the Matter of

ROYSTER GUANO COMPANY

vs.

AMERICAN RAILWAY EXPRESS COMPANY

The deposition of William M. Barrett, taken before me, Rita Ohlsen, a notary public for the county of New York, in the State of New York, pursuant to notice hereto annexed, at 2 Rector street, New York, on the 27th day of February, 1923, between the hours of 9 a. m. and 5 p. m., having been adjourned from February 26th, 1923, to be read as evidence on behalf of American Railway Express Company in a certain action at law depending in the Circuit Court of the City of Norfolk, Virginia, wherein Royster Guano Company is plaintiff and American Railway Express Company is defendant.

Present: Kenneth E. Stockton, for the defendant.

[fol. 24] The witness, WILLIAM M. BARRETT, being duly sworn, deposes as follows:

1. First question for defendant. Please state your name, age and residence?

Answer. William M. Barrett; 64; 272 West 86th Street, New York City.

2. Second question for same. What official capacity do you hold with reference to the Southern Express Company, Mr. Barrett?

Answer. President.

3. Third question for same. Do you have any official capacity with reference to the Adams Express Company?

Answer. I have.

4. Fourth question for defendant. What is it?

Answer. President.

5. Fifth question for defendant. How long have you been president of the Adams Express Company?

Answer. About 12 years.

6. Sixth question for defendant. Are you familiar with the transaction by which the Southern Express Company transferred its tangible assets used in the domestic express business to the American Railway Express Company?

Answer. I am.

7. Seventh question for defendant. Did you have a personal part in the circumstances surrounding that transaction?

Answer. I did.

8. Eighth question for defendant. Did you negotiate personally with the Director General of Railroads and his representatives concerning the transfer of such tangible property of the Southern Express Company to the American Railway Express Company?

Answer. I did.

9. Ninth question for defendant. Will you state briefly what alternative the Southern Express Company found itself confronted by on December 28, 1917, when the Director General of Railroads took over control of all the railroad companies?

Answer. It was necessary for the Southern Express Company's business to operate over railroad lines, and we could not tell at first whether or not the Southern Express Company was taken over by the Director General, as well as the railroad lines. We went to Wash- [fol. 25] ington to interview him and, after considerable discussion, he finally held that he had not taken over the express companies and declared that he would not do so. He finally indicated that he would be willing to deal with a single company which should operate all over the United States. As President of the Adams Express Company, I told him that I was willing for the Adams Express Company to turn over its operating property to such a company, but I would not agree to turn over the Southern Express Company's property to such a single company as we preferred to operate it ourselves or to have it taken over under Federal control. Mr. Prouty, who was the representative of the Director General, with whom I was dealing, said that he could make the Southern Express Company transfer its property to the single company to be formed and indicated that if it did not, he would see that its rates were lowered which was within the Director General's power. The Director General refused to recognize any of the old contracts between the Southern Express Company and the railroads over which it was operating, and if he had refused to allow it to operate over these railroads, the Southern Express Company would have had to go out of business. In such case, its tangible property would have been scattered all over the southern part of the United States, and it would have been impossible to realize for it anywhere near what it was actually worth. The only way that we could obtain anywhere near the actual value of the physical property of the Southern Express Company under those circumstances was by transferring it to the American Railway Ex-

press Company at its book *v*alue less depreciation, taking stock of the American Railway Express Company at par. This entire transaction was, as a practical matter, forced upon the Southern Express Company by the emergencies of the situation, by the direct order of the Director General of Railroads. The entire organization of the American Railway Express Company was under the supervision of the Director General of Railroads. The Southern Express Company would have much preferred to take money in exchange for its property, but the plan of organization of the American Railway Express Company, approved by the Director General of Railroads, only contemplated the issue of the stock for this property, and, as a matter of fact, the Southern Express Company was compelled by the Director General to contribute about $300,000 in cash toward a fund for working capital for the newly formed American Railway Express Company. The transfer was not voluntary in any sense and was only made in order to secure as nearly as we could [fol. 26] the actual physical value of the property transferred. This transfer only included the real estate and equipment used in the express business and the Southern Express Company did not transfer to the American Railway Express Company any of its franchises.

10. Tenth question for the defendant. Did the Southern Express Company retain any property at the time it transferred its tangible property to the American Railway Express Company?

Answer. Yes.

11. Eleventh question for defendant. Approximately what amount?

Answer. We retained such real estate as was not used in the express operation business, together with treasury assets, the value of which was approximately $1,000,000.

12. Twelfth question for defendant. Has the Southern Express Company liquidated itself by distributing any of its property or stock of the American Railway Express Company to its stockholders?

Answer. No.

13. Thirteenth question for defendant. There has been no distribution to the stockholders whatsoever?

Answer. No.

14. Fourteenth question for the defendant. Then the stock of the American Railway Express Company which was received in exchange for the tangible property of the Southern Express Company used in the domestic express business is still in the possession of the Southern Express Company?

Answer. Yes.

15. Fifteenth question for defendant. Are you a member of the board of directors of the American Railway Express Company?

Answer. I am.

16. Sixteenth question for defendant. Will you state how many directors there are on the board of directors of the American Railway Express Company?

Answer. The full complement is 12.

17. Seventeenth question for defendant. How many directors of

the American Railway Express Company are directors or officers of the Southern Express Company?

Answer. Four.

18. Eighteenth question for defendant. Are you an officer of the American Railway Express Company?

Answer. No.

19. Nineteenth question for defendant. Is any officer or director of the Southern Express Company an officer of the American Railway Express Company?

[fol. 27] Answer. No.

20. Twentieth question for defendant. Do you know what the total amount of issued capital stock of the American Railway Express Company is?

Answer. Capital stock is $40,000,000; the stock issued is $34,642,000.

21. Twenty-first question for defendant. What is the par value of the capital stock of the American Railway Express Company owned by the Southern Express Company?

Answer. $1,750,00-.

22. Twenty-second question for defendant: Is there any voting trust or other arrangement by which the Southern Express Company controls the policy or operations of the American Railway Express Company?

Answer. No.

23. Twenty-third question for defendant. Does the Southern Express Company own any obligations of the American Railway Express Company except the stock above mentioned?

Answer. No.

24. Twenty-fourth question for defendant. Has the Southern Express Company any contract with the American Railway Express Company by which the Southern Express Company agrees to reimburse the American Railway Express Company for judgments recovered against the American Railway Express Company on claims and liabilities of the Southern Express Company?

Answer. No, and there never was.

25. Twenty-fifth question for defendant. If a judgment is recovered against the American Railway Express Company in this suit, what proportion of it will affect the dividends of the Southern Express Company?

Answer. Approximately about 5%.

26. Twenty-sixth question for defendant. Does the Southern Express Company still retain its corporate existence?

Answer. Yes.

27. Twenty-seventh question for defendant. Does it maintain offices anywhere?

Answer. Yes.

28. Twenty-eighth question for defendant. Where?

Answer. New York only.

29. Twenty-ninth question for defendant. Where are those offices located?

Answer. 51 Broadway, New York.

[fol. 28] 30. Thirtieth question for defendant. Does it have officers at these offices who are authorized to accept service of suits against it?

Answer. Yes.

31. Thirty-first question for defendant. Does it have ample assets to meet all the known outstanding claims against it?

Answer. Yes.

And further this deponent saith not.

(Signed) William M. Barrett.

STATE OF NEW YORK,
County of New York, ss:

I, Rita Ohlsen, a Notary Public for the county of New York, in the State of New York, do hereby certify that the foregoing deposition was duly taken, reduced to writing and signed by the witness before me, at the place and time therein mentioned, pursuant to the annexed notice.

In witness whereof I have hereunto set my hand and affixed my official seal at New York aforesaid, this 27th day of February, 1923.

(Signed) Rita Ohlen, Notary Public. Notary Public, Kings Co., No. 117. Certificate filed Kings Co. Register's Office No. 3060. Certificate filed New York County No. 165. Certificate filed N. Y. Register No. 3127. Commission expires March 30th, 1923."

Mr. Anderson: I offer these depositions in evidence, and I also offer in evidence a copy of the articles of the incorporation of the American Railway Express Company.

Mr. Collins: Objected to as being absolutely irrelevant and having nothing to do with this case. It is not a certified copy at all.

Mr. Anderson: I can get and have furnished a certified copy. You are objecting to it on the grounds of irrelevancy?

Mr. Collins: Yes.

NOTE.—Articles of the incorporation are read, as follows:

[fol. 29] "ARTICLES OF INCORPORATION OF THE AMERICAN RAILWAY EXPRESS COMPANY

First. The name of this Corporation shall be the American Railway Express Company.

Second. Its principal office or place of business in the State of Delaware shall be located in the city of Dover, County of Kent, and its resident agent shall be the United States Corporation Company, whose address is 311 South State Street, in said city.

Third. The nature of the business and the objects and purpose proposed to be transacted, promoted and carried on, are as follows:

To engage in and carry on in the State of Delaware, and in and between any and all of the States, Territories and possessions of the United States and the District of Columbia, and in adjacent foreign countries, the business of carrying and transporting and forwarding by railroads, steamboats, ships, canals, stages and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and movable valuables of any description, over and upon such lines and routes as it may from time to time establish, and in and between the points, places or stations at which it may from time to time establish and continue agencies; and the said corporation is hereby invested with the powers necessary and proper for said purpose, as well as the powers incident and appropriate to express carriers, and especially with full power to give such security in the nature of a general transportation bond as may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bond, from port to port in the United States or through the United States.

To take bonds of indemnity with or without security from its agents and employes to acquire by purchase, devise or otherwise, [fol. 30] and to hold real and personal estate of any value to the amount necessary and proper for the purpose for which it is incorporated, and to sell, mortgage or otherwise dispose of the same;

To borrow, when necessary for the purpose of its business, money, with or without pledge of or mortgage on all or any of its property, real or personal, as security;

To take, hold and dispose of any mortgage on real or personal estate; and to issue bonds, debentures or obligations of the corporation from time to time for any of the objects or purposes of the corporation;

To have one or more offices, to carry on any or all of its operations or business and without restriction or limits as to amount to purchase or otherwise acquire, to hold, own, to mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, territories, districts, colonies, or possessions of the United States and in adjacent foreign countries, subject to the laws of such state, district, territory, colony, possession or country;

To enter into, make, perform, and carry out contracts of every kind for any lawful purpose without limit as to amount with any person, firm, association or corporation; and to act as agent for any person, firm, association or corporation for any lawful purpose; and to do a general collection business.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

In general, to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the laws of said State.

To purchase, hold and reissue any of the shares of its capital stock.

Fourth. The total authorized capital stock of this corporation is Forty Million Dollars ($40,000,000), divided into Four Hundred Thousand (400,000) shares of par value of One Hundred Dollars ($100) each.

The amount of capital stock with which this corporation will commence business is Thirty-three Million Dollars (33,000,000).

The names and places of residence of each of the subscribers to the capital stock are as follows:

[fol. 31] Name — Residence

William M. Barrett.....272 West 86th St., New York, N. Y.
George C. Taylor.....328 Cliff Ave., Pelham Heights, N. Y.
Burns D. Caldwell.....81 High Street, Orange, N. J.

The existence of this corporation is to be perpetual.

The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

The Directors shall have power to make and to alter or amend the By-laws; to fix the amount to be reserved as working capital, and to authorize and cause to be executed, mortgages and liens without limit as to amount, upon the property and franchises of this Corporation.

The By-laws shall determine whether and to what extent the accounts and books of this corporation (other than the stock ledger), or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book, or document of this Corporation, except as conferred by law or the By-laws, or by resolution of the stockholders.

The stockholders and directors shall have power to hold their meetings and keep the books, documents and papers of the corporation outside of the State of Delaware, at such places as may from time to time be designated by the By-laws or by resolution of the stockholders or directors.

The Directors shall have power, by a resolution passed by a majority vote of the whole Board, under suitable provision of the By-laws, to designate two or more of their number to constitute an Executive Committee, which committee shall, for the time being, as provided in said resolution or in the By-laws, have and exercise any or all the powers of the Board of Directors which may be lawfully delegated in the management of the business and affairs of the Corporation and shall have power to authorize the seal of the said Corporation to be affixed to all papers which may require it.

This corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the statutes of the State of Delaware, and all rights conferred on officers, directors, stockholders herein are granted subject to this reservation.

We, the undersigned, for the purpose of forming a Corporation under the laws of the State of Delaware, do make, file and record this [fol. 32] Certificate, and do certify that the facts herein stated are

true; and we have accordingly hereunto set our respective hands and seals.

Dated at New York, June 20th, 1918.

William M. Barrett (Seal), George C. Taylor (Seal), Burns D. Caldwell (Seal).

In the presence of F. P. Small, T. B. Harrison.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered, that on this twentieth day of June, 1918, A. D., personally appeared before me, the subscriber, a Notary Public, for the State of New York, William M. Barrett, George C. Taylor and Burns D. Caldwell, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate of Incorporation to be their act and deed, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

C. S. Cable, Notary Public. C. S. Cable, Notary Public, New York County. C. S. Cable, Notary Public, New York. New York County No. 306. New York County Register's No. 10245."

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Anderson: Now, if your Honor please, at this point, in view of the evidence before the Court, I want to move for an exclusion of the evidence introduced on the behalf of the plaintiff as it does not show any consolidation or merger of the two companies, and to charge the American Railway Express Company with the debt of the Southern Express Company under the evidence in the case would be [fol. 33] in violation of the Fourteenth Amendment of the Federal Constitution.

The Court: I overrule that motion.

Mr. Anderson: Exception noted.

The Court: Gentlemen, are you through with the testimony you are going to put in?

Mr. Anderson: Yes, except I would like to prove one other question, as to when the American Railway Express Company came in, if we can concede it.

NOTE.—By stipulation of counsel it is conceded that the American Railway Express Company began operations in the State of Virginia and elsewhere on the 1st day of July, 1918, and after that time the Southern Express Company no longer operated a transportation company in Virginia.

Mr. Collins: Under the record in this case, if your Honor please, it will be seen that this claim originated, as is shown here, in 1917, before they moved.

NOTE.—Record in the case of F. S. Royster Guano Company, a corporation, versus Southern Express Company, Incorporated, heretofore introduced in evidence as a part of this record, follows:

Memorandum—Exhibit in Evidence

"IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

SOUTHERN EXPRESS COMPANY, INCORPORATED, Defendant

Trespass on the Case. Damages, $600.00. 1 Dec. R., 1919

PRÆCIPE FOR SUMMONS

The Clerk of the Circuit Court for the City of Norfolk, Virginia, will please issue process as above and send process to Richmond, Virginia, for service on William F. Rhea, Chairman State Corporation Commission.

(Signed) Cadwallader J. Collin, p. q.

Filed Sept. 15/19."

[fol. 34] SERVICE

The Commonwealth of Virginia to the Sergeant of the City of Norfolk, Greeting:

We command you that you summon Southern Express Company, Incorporated, to appear at the Clerk's Office of our Circuit Court of the City of Norfolk, at the Rules to be holden for the said Court, on the first Monday in December, 1919, to answer F. S. Royster Guano Company, a Corporation, of a plea of trespass on the case, Damages $600.00.

And have then and there this writ.

Witness Laurence Waring, Clerk of our said Court, at his office, the 15th day of September, 1919, in the 144" year of our foundation.

Teste:

Laurence Waring, Clerk, by A. M. Layton, D. C.

(Reverse of Service)

John B. Hockaday, the lawfully appointed Agent upon whom may be served all lawful process against the within mentioned Southern Express Company, Incorporated, a foreign corporation, being no

longer a resident of the State of Virginia, and being absent from the State and no person residing in this State having been appointed in his place the within summons was executed on this 16th day of September, 1919, by delivering a true copy of the same to William F. Rhea, the Chairman of the State Corporation Commission, in person, in the city of Richmond, Virginia, in which city the said William F. Rhea resides, and by immediately transmitting a copy hereof by mail to said Southern Express Company, Incorporated.

(Signed) J. Herbert Mercer, Sheriff of the City of Richmond, by B. A. Braner, Depty. Sheriff.

Sheriff's fee, $1.00, paid."

[fol. 35] DECLARATION

"IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

SOUTHERN EXPRESS COMPANY, INCORPORATED, Defendant

F. S. Royster Guano Company, a corporation under the laws of Virginia, complains of Southern Express Company, Incorporated, a foreign corporation authorized to do business in Virginia, for this, to-wit: that the said defendant before and at the time of the delivery to it of the goods and chattels hereinafter mentioned was a common carrier of goods and chattels for hire from Richmond, in the State of Virginia, to Norfolk, in the State of Virginia, and while the defendant was a common carrier as aforesaid, the plaintiff heretofore, to-wit, on or about the 27th day of September, 1917, at Richmond, Virginia, caused to be delivered to the defendant two (2) Packages of Fertilizer Tax Tags of the value of four hundred and fifty dollars ($450.00), and one package of Fertilizer Tax Tag Hooks of the value of fifteen dollars ($15.00), to carry from said Richmond, Virginia, to said Norfolk, Virginia, and there to be delivered to the plaintiff for a certain reasonable reward to the said defendant in that behalf, and it then and there became and was the duty of the defendant to take due and proper care of said goods and chattels and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid.

Yet the defendant, not regarding its duty as such common carrier as aforesaid, did not deliver said two (2) Packages of Fertilizer Tax Tags to the plaintiff, but on the contrary thereof, so carelessly and negligently behaved and conducted itself in the premises, that by reason of the carelessness, negligence, and default of the defendant said two (2) Packages of Fertilizer Tax Tags and their contents, being of the value of four hundred and fifty dollars ($450.00), as aforesaid, were wholly lost to said plaintiff.

And the plaintiff claims of the defendant the sum of six hundred dollars ($600.00), for damages which have resulted from said carelessness, negligence and fault of said defendant.

(Signed) Cadwallader J. Collins, p. q.

Lodged 11/12/19.
Filed 1 Dec. R/19. L. W."

[fol. 36] MOTION TO QUASH

"IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VA.

F. S. ROYSTER GUANO COMPANY

vs.

SOUTHERN EXPRESS COMPANY

Motion to Quash the Service of the Writ in This Case and the Return Thereon and to Dismiss the Action

The Southern Express Company, a corporation, appearing specially and only specially and solely to move the Court to quash the service and writ in this action and the return thereon, prays the judgment of this honorable court on said motion to quash whether it ought to be required to appear in accordance with said process or service thereof, upon the Hon. William F. Rhea, Chairman of the State Corporation Commission of Virginia, because it says:

(1) That said writ and the return thereon is not proper and lawful.

(2) That at the time of and before the service of said process it had no Agent in this state on whom said notice of motion could be lawfully served and at the time of the aforesaid attempted service of said writ, it was not carrying on its business in the state of Virginia, and does not accept or waive service of said writ.

(3) The said defendant still appearing specially and only specially for the foregoing reasons, moves the Court to dismiss said action.

(Signed) Wyndham R. Meredith, p. q.

Filed Nov. 18/19. LW."

JUDGMENT

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK ON THE 15TH DAY OF MAY, 1920

F. S. ROYSTER GUANO COMPANY

vs.

SOUTHERN EXPRESS COMPANY

[fol. 37] This day came the plaintiff by its attorney, and thereupon the defendant being solemnly called, came not, and the plaintiff not demanding a jury, the court proceeded to hear the evidence and try the case. Whereupon it is considered by the court that the plaintiff recover against the defendant the sum of four hundred and fifty dollars, with legal interest thereon from the 15th day of May, 1920, till paid, and its costs by it about its suit in this behalf expended.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

VIRGINIA:

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 3 AND ORDER SETTLING SAME

During the course of the trial of this cause the plaintiff offered in evidence the entire record in the case of F. S. Royster Guano Company vs. Southern Express Company, including final judgment rendered in the sum of $450.00 on the 15th day of May, 1920, including the cost, to the introduction of which record the defendant objected on the grounds that the judgment is not valid for lack of proper process, which objection the Court overruled to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

[fol. 38] BILL OF EXCEPTION NO. 4 AND ORDER SETTLING SAME

After the introduction of the evidence on behalf of the plaintiff and the defendant, the defendant moved the Court for the exclusion of the evidence introduced on behalf of the plaintiff on the grounds that it

failed to show a merger or consolidation of the Southern Express Company and the American Railway Express Company and the defendant's evidence showed that there was not a merger or consolidation of the two companies, and that to charge the American Railway Express Company with the debt of the Southern Express Company under the evidence introduced would be in violation of the Fourteenth Amendment of the Federal Constitution, which motion the Court overruled and to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 5 AND ORDER SETTLING SAME

After the introduction of the evidence and argument of counsel the Court took the case under advisement and after having given consideration to the issues involved, entered judgment against the defendant in favor of the plaintiff for the sum of $461.40, with interest on $450.00 from May 15, 1920, whereupon the defendant moved the Court for a rehearing on the grounds that the judgment was contrary to the law and the evidence and in violation of the Fourteenth Amendment to the Federal Constitution, which motion the Court overruled and to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

[fol. 39] IN CIRCUIT COURT OF CITY OF NORFOLK

CLERK'S CERTIFICATE

I, Laurence Waring, Clerk of the Circuit Court of the City of Norfolk, do certify that the foregoing is a true transcript of the record in the suit of F. S. Royster Guano Company, a corporation, plaintiff, against American Railway Express Company, a corporation, defendant, lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the plaintiff had received due notice thereof, and of the intention of the defendant to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment therein.

Teste:

Laurence Waring, Clerk, by A. M. Brown, D. C.

Fee for transcript: $18.25.

A copy—Teste: H. Stewart Jones, C. C.

[fol. 40] In the Special Court of Appeals, Held at the Library Building, in the City of Richmond

AMERICAN RAILWAY EXPRESS COMPANY, Plaintiff in Error,

against

F. S. ROYSTER GUANO COMPANY, Defendant in Error

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of the City of Norfolk on the 13th Day of April, 1923

ARGUMENT AND SUBMISSION—Dec. 12, 1924

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy.
Teste:

H. Stewart Jones, C. C.

[fol. 41] IN SPECIAL COURT OF APPEALS

[Title omitted]

JUDGMENT—Feb. 26, 1925

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said circuit court.

A copy.
Teste:

H. Stewart Jones, C. C.

Defendant in Error's Costs

Attorney's fee	$20.00
Clerk's small fees	2.59
	$22.59

Teste:

H. Stewart Jones, C. C.

[fol. 42] IN SPECIAL COURT OF APPEALS

JUDGE'S CERTIFICATE TO CLERK

I, Beverly T. Crump, President of the Special Court of Appeals of the State of Virginia, hereby certify that H. Stewart Jones, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, Clerk of said court, duly commissioned and qualified.

Beverly T. Crump, President of the Special Court of Appeals of Virginia.

CLERK'S CERTIFICATE TO JUDGE

I, H. Stewart Jones, Clerk of the Special Court of Appeals of the State of Virginia, hereby certify that Beverly T. Crump, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, President of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 30th day of March, 1925.

H. Stewart Jones, Clerk of the Special Court of Appeals of Virginia. (Seal Supreme Court of Appeals of Virginia, Richmond.)

[fol. 43] IN SPECIAL COURT OF APPEALS

CLERK'S CERTIFICATE

I, H. Stewart Jones, Clerk of the Special Court of Appeals of the State of Virginia, do hereby certify that the foregoing are true and accurate copies of the record and papers in the case of American Railway Express Company against F. S. Royster Guano — on file and of record in my said office.

Witness my hand and seal of said court this 30th day of March, 1925.

H. Stewart Jones, Clerk. (Seal Supreme Court of Appeals of Virginia, Richmond.)

Plaintiffs' costs, 23.69.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1925

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

It is further ordered that this cause be, and the same is hereby, advanced and assigned for argument with No. 268 heretofore assigned for Monday, November 2d next, as one case.